COURT OF APPEALS NO. 46162-5-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON,
DIVISION TWO

MIGUEL A. ALBARRAN,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Barbara D. Johnson, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

ARGUMENT IN REPLY 1

1. THE COURT VIOLATED APPELLANT'S RIGHT TO CONFRONTATION WHEN IT PREVENTED THE DEFENSE FROM INTRODUCING SPECIFIC ACTS DEMONSTRATING A KEY WITNESS'S MOTIVE AND BIAS 1

2. THE COURT VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE WHEN IT EXCLUDED AN ALTERNATIVE SOURCE FOR THE DNA 7

3. THE GENERAL/SPECIFIC DOCTRINE REQUIRES THAT THE CONVICTION FOR RAPE IN THE SECOND DEGREE BE DISMISSED 14

CONCLUSION 18

TABLE OF AUTHORITIES

Page

Cases

State v. Al-Hamdani,
109 Wn. App. 599, 36 P.3d 1103 (2001) 17

State v. Berniard,
182 Wn. App. 106, 327 P.3d 1290 (2014) 6

State v. Birgen,
33 Wn. App. 1, 651 P.2d 240 (1982) 15

State v. Clements,
78 Wn. App. 458, 898 P.2d 324 (1995) 17

State v. Darden,
145 Wn.2d 612, 41 P.3d 1189 (2002) 5

State v. Fisher,
165 Wn.2d 727, 202 P.2d 937 (2009) 4, 6

State v. Franklin,
180 Wn.2d 371, 325 P.3d 159 (2014) 12

State v. Hudlow,
99 Wn.2d 1, 659 P.2d 514 (1983) 10

State v. Hughes,
166 Wn. 2d 675, 212 P.3d 558 (2009) 15, 16, 17, 18

State v. Iniguez,
167 Wn.2d 273, 217 P.3d 768 (2009) 12

State v. Knapp,
14 Wn. App. 101, 540 P.2d 898 (1975) 6

State v. Pickens,
27 Wn. App. 97, 615 P.2d 537 (1980) 3

State v. Reed,
101 Wn. App. 704, 6 P.3d 43 (2000) 10

State v. Robbins,
35 Wn. 2d 389, 213 P.2d 310 (1950) 3

State v. Smith,
177 Wn.2d 533, 303 P.3d 1047 (2013) 15

Statutes

RCW 9.94A.537 18

Other Authorities

Sixth Amendment and Const, art. 1, § 22 10

U.S. Cases

Chambers v. Mississippi,
410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) 7

Davis v. Alaska,
415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105, 1110 (1974) 2, 3

United States v. Platero,
72 F.3d 806 (10th Cir. 1995) 5

ARGUMENT IN REPLY

1. THE COURT VIOLATED APPELLANT'S RIGHT TO CONFRONTATION WHEN IT PREVENTED THE DEFENSE FROM INTRODUCING SPECIFIC ACTS DEMONSTRATING A KEY WITNESS'S MOTIVE AND BIAS.

Denise Domke claimed that she observed Miguel Albarran engaging in oral sex with her sleeping, 13 year old daughter. RP 251. The daughter herself had no recollection of any sexual contact, thus making Denise a crucial witness for the State. RP 68-69. The defense theory was that Denise took an innocent act—Miguel placing a blanket over the sleeping girl—and intentionally misrepresented it due to her anger and jealousy over Miguel's repeated infidelity. The defense theory relied on demonstrating how Denise's extreme anger and jealousy against Miguel caused her to take the extraordinary step of making false allegations to the police.[1]

As set forth in the opening brief, the court violated Albarran's right to confront witnesses when the State suppressed the specific evidence needed to demonstrate Denise's intensity of feelings. Specifically, the court erred when it excluded evidence that Denise had used a GPS tracker to follow Miguel to another woman's house, where she then assaulted him

[1] For consistency with the opening brief, appellant will continue to refer to Miguel Albarran and Denise Domke by their first names. No disrespect is intended. In the State's response brief, the State refers to Denise Domke as "Ms. Domke" and Miguel Albarran as simply "Albarran."

in front of that woman. RP 30-32, 235, 240. The court also excluded evidence that Denise had assaulted him on other occasions as a result of his infidelities and her jealousy. *Id.* Additionally, the court excluded evidence of statements made by Denise on Facebook demonstrating a desire to seek revenge on Miguel. RP 240-241.

In response, the State argues that evidence of the GPS tracker and ensuing assault is irrelevant. Response Brief at 13. The argument is puzzling. The State first concedes that, "Albarran's infidelity was a proper area of cross examination because it might reveal ongoing anger or hurt on Ms. Domke's part, which could tend to show bias." *Id.* State's counsel then contradicts herself by stating, "the specific act of placing a tracking application on Albarran's phone did not show bias." *Id.* The argument makes no sense as the very reason Denise placed the tracker was because she suspected infidelity. Tracking movements is an extraordinary measure, demonstrating Denise's intense feelings of anger and jealousy, and her bias against Miguel. Miguel was denied his right to present his theory of the case when the GPS evidence was excluded.

State and federal courts recognize that simply allowing the defense to elicit testimony that a witness may be biased does not necessarily satisfy the Sixth Amendment's right to confrontation. *See e.g., Davis v. Alaska*, 415 U.S. 308, 316, 39 L. Ed. 2d 347, 94 S. Ct. 1105, 1110 (1974);

State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010). Rather, the defense has the right to present the specific facts that demonstrate the bias. As the court in *State v. Robbins* explained, "It is generally recognized, however, that the inquiry is not strictly limited to the simple question of whether hostility exists, but that, within reasonable limits, the witness may be interrogated as to particular facts tending to show the nature and extent of the hostility." *State v. Robbins*, 35 Wn. 2d 389, 396, 213 P.2d 310, 315 (1950). The true extent of Denise's bias against Miguel could not be established without presenting her extreme behaviors of, tracking and assaulting Miguel. The defense had the right to present facts that would allow the jury to reach its own conclusions regarding Denise's bias and desire for revenge. *See e.g., State v. Pickens*, 27 Wn. App. 97, 100, 615 P.2d 537, 539 (1980) ("the court may violate the confrontation clause if it prevents the defense from placing facts before the jury from which such bias or prejudice may be inferred.); *Davis v. Alaska, supra at* 316 (defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.) Simply asking Denise whether she was jealous did not allow the jury to infer and understand the extent of that jealousy.

In its response brief, the State cites to and relies upon *State v. Fisher*, 165 Wn.2d 727, 752, 202 P.2d 937 (2009) to argue that bias evidence need not be admitted where it is repetitive or only marginally relevant. But the holding in *Fisher* does not support the State's claim that the GPS and assault testimony was properly excluded. Although *Fisher* involved similar child molestation type allegations, the excluded evidence was of a completely different character. In *Fisher*, an eighteen-year-old told her mother that when she was twelve, her dad sexually abused her. *Id.* at 733. The alleged abuse had occurred when the complaining witness's parents were still married. At trial, the mother was a witness, but not a key witness. The defense intended to demonstrate the mother's bias by cross-examining her about her financial incentive to lie. Specifically, "Fisher sought to admit evidence that Ward refused to sell their family home and filed for bankruptcy to avoid paying the divorce judgment." *Id.* at fn. 6. The trial court excluded the financial evidence, finding that "it was too remote in time to be relevant." *Id.* at 752.

On appeal, the Washington Supreme Court affirmed this ruling. The Supreme Court noted that a defendant enjoys more latitude to expose the bias of a key witness, but that the mother in this case was not a key witness. *Id.* at 752-53. Further, given the passage time since the divorce,

and the speculative and remote nature of the evidence, the Sixth Amendment did not require introduction of this evidence. *Id.*

Our case stands in sharp contrast. Here, Denise was the State's key witness, and the only witness who claimed to have seen Miguel commit this offense. *See State v. Darden,* 145 Wn.2d 612, 619, 41 P.3d 1189 (2002) ("the more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters.") Further, the evidence here was more recent in time, and Denise's physical assault of Miguel upon finding him with another woman can hardly be considered speculative or ambiguous. *Fisher* provides no support for the State's argument.

The State refers to Miguel's "spurious allegation" against Denise (Resp. brief at 13), as if characterizing it as such somehow makes the evidence less admissible. This is simply incorrect. While the State is certainly entitled to its opinion of the evidence, neither the trial court nor the prosecutor can exclude evidence because they personally do not believe it to be true. The jury is the arbiter of credibility. The court must accept the evidence as true, when determining whether to admit it. *See e.g., United States v. Platero*, 72 F.3d 806, 813 (10th Cir. 1995).

In addition to the GPS tracker and the jealous assaults, the defense wanted to cross examine Denise about a Facebook entry in which she expressed a desire to assist others in going after Miguel in court. RP 30-32, 237. The trial court excluded that evidence, finding that because it occurred after the allegations, it was not relevant to bias. RP 240-241. As described in the opening brief, this was incorrect. The defense has the right to explore witness bias that might exist at the time of testifying. *State v. Fisher,* 165 Wn.2d at 752-753 ("Bias includes that which exists at the time of trial"). Here, the court applied the wrong standard in determining whether the evidence was admissible. A court abuses its discretion when it applies an incorrect legal standard. *State v. Berniard*, 182 Wn. App. 106, 118, 327 P.3d 1290, 1296 (2014). That is precisely what occurred here.

The State's response on the Facebook issue places great reliance upon *State v. Knapp*, 14 Wn. App. 101, 540 P.2d 898 (1975). In *Knapp*, defendant wanted to introduce two incidents in the past where his brother had encouraged him to commit a crime. The defense argued this was evidence that the brother was trying to frame the defendant. The court of appeals correctly determined that this was too attenuated to establish bias. *Knapp*, at 109. By contrast, Miguel wished to cross-examine Denise on a

Facebook page in which she expressed a desire to get him in more trouble. This was not speculative, nor was it remote in time.

For the reasons sets forth here and in the opening brief, the court's refusal to allow meaningful cross-examination on the issue of bias requires a reversal of the conviction.

2. THE COURT VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE WHEN IT EXCLUDED AN ALTERNATIVE SOURCE FOR THE DNA.

In addition to the right of cross-examination, a defendant has the right to present evidence in his or her defense. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Besides Denise, the State's main evidence against Miguel were the small amounts of the DNA evidence found on T.P.'s inner thigh, panties, and vagina area. RP 218. In order to explain an alternative source for the DNA, the defense sought to introduce evidence that T.P. had access to a vibrator regularly used by Miguel and Denise. RP 352. The defense also wanted to explain the presence of the vibrator, as either the police or Denise could have used his DNA from that source to wrongfully accuse Miguel. RP 8, 353-354. The State's own expert agreed that DNA could be transferred from one object to another person or thing. RP 227-229. But when the trial court

excluded all evidence of the vibrator, the defense lost the ability to meaningfully contest the DNA evidence.

The court excluded the evidence on the basis of hearsay. Specifically, the court found it would be hearsay for Miguel to repeat Denise's statements about her daughter using their vibrator. RP 355. But the hearsay rule only prohibits out of court statements, it does not prohibit a witness from testifying to his observations. As described in the opening brief, Miguel should have been allowed to testify that his DNA was on a vibrator, and that T.P. had access to that location. All of this was based on his personal knowledge and observation, not hearsay evidence

In its response brief, the State asserts, "the evidence was inadmissible because it was an out of court statement offered for the truth of the matter asserted, and no recognized exception would have allowed its admission." Response Brief at 19. The State makes no attempt to explain how Miguel's observations constitute hearsay. As the State presents no argument, appellant will stand on the argument presented in his opening brief.

Next, the State claims "the evidence was irrelevant because it was inflammatory, it served to besmirch the victim without a proper factual basis and because it would have confused the jury." Response Brief at 19. Beyond the rhetoric, the State provides two main reasons for claiming that

the evidence was unreliable and therefore irrelevant: 1) the vibrator could not have transferred the DNA evidence to T.P. because both sperm and saliva were discovered on the swab from T.P. *Id.,* and *2)* because Miguel and Denise used the vibrator together, Denise's DNA would have been present on the swab if T.P. had used the vibrator. *Id.* Upon closer examination, neither of these arguments hold water.

As to the lack of Denise's DNA on the swab, this argument goes to the weight of the testimony, not its admissibility. The Supreme Court's decision in *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010) is directly on point. *Jones* was a rape case with a consent defense. The defendant claimed that the complaining witness, his niece, had attended a sex party in which she had consensual sex with three men, including the defendant. *Jones*, 168 Wn.2d at 717. The only sperm found on the complaining witness, however, was from the defendant. *Id.* at 724. The trial court excluded the sex party evidence, believing that it was being used to attack the woman's credibility and was therefore barred by the rape shield statute. *Id.* at 717-18.

The Supreme Court reversed the conviction in a unanimous decision. The Supreme Court explained that the rape shield statute did not apply in this context. *Id.* at 722. Further, explained the Court, even if the evidence had implicated the rape shield statute, the evidence would have

been admissible. This is because when evidence, if believed, has a high probative value, the Sixth Amendment requires admission of that evidence. *Jones*, 168 Wn.2d at 721, 723; *See, State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983). (For evidence of high probative value "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const, art. 1, § 22.); *State v. Reed*, 101 Wn. App. 704, 715, 6 P.3d 43 (2000) ("Evidence relevant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest.").

The prosecution in *Jones* argued that the lack of sperm from any of the other men purportedly at this sex party made the proffered evidence unbelievable. Our Supreme Court disagreed:

> Admittedly, Jones's version of the events is not airtight. He did not call any of the other members of the alleged sex party as witnesses, K.D.'s testimony directly contradicted Jones's account, and only Jones's semen was found on K.D. Nevertheless, a reasonable jury that heard of a consensual sex party may have been inclined to see the sexual encounter in a different light.

Jones, at 724.

In the current case, the State makes the same argument, claiming that the absence of Denise's DNA makes the evidence unreliable and inadmissible. As in *Jones*, the State's argument is not persuasive. Indeed, the lack of Denise's DNA is more understandable than the absence of

other sperm in *Jones*. Here, under the defense theory, the DNA located on T.P. resulted from a secondary transfer involving an inanimate object. The fact that not all of the DNA originally on that object would transfer to a second person is hardly surprising.

The State's second argument, the one involving the implausibility of both sperm and saliva on a sex toy, can be disposed of even quicker. Indeed, the State's argument demonstrates why we have juries. While counsel for the State may not be able to conceive of how both saliva and sperm could be on a vibrator, 12 jurors might bring in a wider range of life experiences where the presence of both types of DNA is not so surprising.

On a more fundamental level, however, the State's argument regarding the sex toy fails to recognize that in evaluating the admissibility of the evidence, and in determining the importance of that evidence for the defense, the court must assume the evidence to be true. See *Jones* at 721 ("Jones' evidence, if believed, would prove consent and would provide a defense to the charge of Second Degree Rape. (emphasis added)") While the State may complain that the evidence should not be believed, evaluating the evidence is the purview of the jury, not the trial court.

The State notes that some courts have applied an abuse of discretion standard to this type of issue, whereas others have conducted a *de novo* review. Response Brief at 21. The State acknowledges the Supreme

Court's decision in *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009), whose holding states *de novo* review is required when a Sixth Amendment violation is raised. The State concludes, "It would seem, then, that the manner in which the defendant elects to frame the issue, even if clearly erroneous, controls the standard of review he enjoys." Response Brief at 21. While appellant might quibble with the State's cynical view of how the courts treat these cases, appellant accepts the State's concession that the *de novo* standard of review is appropriate under existing law. *See also*, *State v. Jones,* 168 Wn.2d at 719 ("Since Jones argues that his Sixth Amendment right to present a defense has been violated, we review his claim de novo.")

On a related issue, the State invites this Court to apply a non-constitutional test for determining whether the error was harmless. Response Brief at 21-22. The State's invitation should be declined. Appellant was not merely limited on questions that could be asked, but was excluded from presenting evidence to rebut the State's arguments regarding the DNA evidence. Case law is abundantly clear that the constitutional harmless error standard applies in this situation. See *State v. Franklin*, 180 Wn.2d 371, 325 P.3d 159 (2014); (constitutional harmless error standard applies where right to confrontation violated by exclusion of other

suspect evidence); *State v. Jones,* 168 Wn.2d at 724 (constitutional error applies to Sixth Amendment violation).

An error is not harmless unless the State can prove "beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." *Jones*, 168 Wn.2d at 724. The State's harmless error analysis simply repeats its earlier arguments as to why the evidence should be excluded. Specifically, "The absence of Ms. Domke's DNA, or the DNA of a third unidentified contributor, in the DNA samples taken from T.P.'s body renders this story irretrievably non-credible." Response Brief at 23. But as previously discussed, the Supreme Court addressed this same issue in *Jones*, where the State unsuccessfully argued that the lack of sperm from the other men made the defendant's claim of a sex party unbelievable. *Jones*, at 724.[2] The same result should apply here.

The State relied upon the scientific certainty that the recovered DNA belonged to Miguel. The jury did not hear that there was another means by which the DNA could have ended up on T.P., whether through T.P.'s use of the vibrator or the mom and police extracting DNA from the

[2] Despite Appellant's reliance upon the *Jones* case in his opening brief, the State made no attempt to discuss or distinguish that case. There were additional facts in *Jones* that suggested guilt, such as defendant's flight from police, that he had to be extridited back to Washington, and that he initially denied having sex with his niece when he spoke to the police. *Jones,* 168 Wn.2d at 717-18. Nonetheless the Supreme Court had little difficulty in finding that the exclusion of this evidence deprived Mr. Jones of a fair trial. *Id.* at 724.

vibrator. Without such evidence, defense counsel was forced to argue in closing, "the defendant said, I don't know how my semen and my saliva got on her, but I didn't put it there." RP 439. Exclusion of the vibrator evidence eviscerated Miguel's defense against the DNA evidence. Reversal is required.

3. THE GENERAL/SPECIFIC DOCTRINE REQUIRES THAT THE CONVICTION FOR RAPE IN THE SECOND DEGREE BE DISMISSED.

The State asserts that Appellant's double jeopardy claim is frivolous. Response Brief at 24. This is a curious claim in that Appellant never alleged a double jeopardy violation. There is no assignment of error claiming a double jeopardy violation, nor do the issues presented allege a double jeopardy violation. Further, nowhere within the text of the argument does Miguel allege a double jeopardy violation. Indeed, the only place in which the term double jeopardy is mentioned is within the context of Appellant's argument relating to general/specific statues. Miguel pointed out that a conviction for both Child Rape and Rape in the Second Degree would violate double jeopardy, which is why the court had to dismiss one and sentence Miguel on the other. Appellant's Brief at 26-28. The argument on appeal is that the court dismissed the wrong conviction based on the general/specific statute. Because Appellant never made a

double jeopardy argument, this brief will not reply to that argument by the State.

The real issue is whether the court violated the general/specific statute doctrine. The State begins it response argument by questioning the continuing validity of *State v. Hughes*, 166 Wn. 2d 675, 212 P.3d 558 (2009). According to the State, *Hughes* relied heavily upon *State v. Birgen*, 33 Wn. App. 1, 651 P.2d 240 (1982), and *Birgen* was disapproved of in *State v. Smith,* 177 Wn.2d 533, 303 P.3d 1047 (2013). *See* Response Brief at 29. But the Supreme Court in *Smith* did not disapprove of its earlier decision in *Hughes*. To the contrary, *Smith* cites to *Hughes* for various black letter law propositions relating to double jeopardy. *See e.g., Smith*, 177 Wn.2d at 545. While the State might wish it otherwise, *Hughes* remains good law.

Next, the State points out that *Hughes* was a double jeopardy case rather than a general/specific case, a fact that Appellant specifically acknowledged in his opening brief. *See* Appellant's Brief at 28.

In the opening brief, Appellant relied upon *State v. Hughes* to argue that a defendant who commits Child Rape in the Second Degree necessarily commits Second Degree Rape under the incapacity prong. Appellant's Brief at 30. The State takes exception to this claim, appearing to dispute that *Hughes* found the elements of Child Rape in the Second De-

gree and Rape in the Second Degree under the incapacity prong to be legally identical under the law. Response Brief at 29-30. However, that is in fact exactly what the *Hughes* Court found:

> Although the elements of the crimes facially differ, both statutes require proof of nonconsent because of the victim's status. Regardless of whether nonconsent is proved by the age of the victim and the age differential between the victim and the perpetrator, or by the mental incapacity or physical helplessness of the victim, both statutes protect individuals who are unable to consent by reason of their status. .

State v. Hughes, 166 Wn. 2d at 683-84.

The State argues that it is "nonsense" to claim that a defendant could be convicted of Rape in the Second Degree based on the child's inability to consent. Response Brief at 32. But this very issue was the subject of discussion in *Hughes*. In reversing the Court of Appeals, the Supreme Court sided with the dissenting appellate court judge. Discussing his dissent with approval, the Court explained, "Given the cases wherein proof of minority age served as proof of mental incapacity or incompetency in other contexts, under the rape statutes, proof of mental incapacity *could be* proved by proof of one's minority age." *Hughes,* Wn.2d at 683.

In attempting to further distinguish the crime of Child Rape with Rape in the Second Degree under the incapacity prong, the State theorizes that the Child Rape statute is not based on the child's inability to consent.

Response Brief at 31-32. Indeed, argues the State, "the rape of a child statute is not concerned at all with consent (or the lack of ability to give it)." Response Brief at 31. But again the State's argument is contrary to *Hughes*, where the Court specifically stated the opposite: "both statutes require proof of nonconsent because of the victim's status." 166 Wn.2d at 683. Contrary to the State's attempt to distinguish the statues, *Hughes* specifically found that "both statutes protect individuals who are unable to consent by reason of their status." *Id.* (emphasis added).

In some cases a victim may be unable to consent because alcohol has reduced her ability to fully understand and appreciate what she is agreeing to. *See State v. Al-Hamdani*, 109 Wn. App. 599, 610, 36 P.3d 1103, 1108 (2001). In other cases, it is the lack of age and maturity that makes a person incapable of appreciating the nature and consequences of the sex act. *See State v. Clements,* 78 Wn. App. 458, 467, 898 P.2d 324 (1995) (courts presume minors lack capacity to consent to sexual relations because they are too immature to rationally or legally consent.). As the *Hughes* Court recognized, in either event, the inability to consent is at the heart of the crime. *Hughes*, 166 Wn.2d at 683.

Persisting in its misunderstanding of *Hughes*, the State argues that the legislature had a different intent in punishing rape based on incapacity versus Child Rape. Response Brief at 30-32. But that issue has already

been decided. In order to determine whether a conviction for both offenses violated double jeopardy, the Supreme Court in *State v. Hughes* necessarily considered the legislative intent in treating them as the same offense.

Next the State argues, "if Albarran is correct, the portion of RCW 9.94A.537 which allows this aggravator to be applied to Rape in the Second Degree would be rendered meaningless." Response brief at 32. This is incorrect. There are many ways of committing Rape in the Second Degree, only one of which relates to incapacity. Thus, a defendant who commits the crime of Rape in the Second Degree by forceful compulsion against a 13 year old would still be subject to the 25-year enhancement. Appellant's argument does not render RCW 9.94A.537 meaningless.

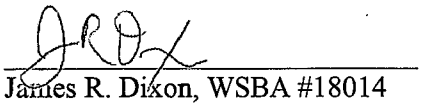
As set forth in Appellant's Opening Brief, under the facts of this case, the general/specific doctrine applies to these two statutes. The State's argument to the contrary is not persuasive. The remedy for this error is vacation of the Second-Degree Rape conviction and sentence, and remand for imposition of sentence on the conviction for Rape of a Child in the Second Degree.

CONCLUSION

Miguel Albarran respectfully requests this Court to reverse his conviction and remand the case to superior court for a new trial. Alterna-

tively, if a new trial is not granted, the conviction still must be vacated and the case remanded to the lower court for imposition of the more specific charge of Rape of a Child in the Second Degree.

Respectfully Submitted: May 7, 2015.



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CERTIFICATE OF SERVICE

I, James R. Dixon, certify that on May 7, 2015, I caused a true and correct copy of this Brief of Appellant to be served on the following in the manner indicated below:

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